

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Complaint of Covad Communications Company and)	
AT&T Communications of New England, Inc.)	D.T.E. 01-39
Regarding Collocation Power Charges Assessed by)	
Verizon New England, Inc.)	

**HEARING OFFICER RULING ON MOTION OF COVAD AND AT&T
FOR LEAVE TO FILE AMENDMENT TO COMPLAINT**

On October 12, 2001, Covad Communications Company ("Covad") and AT&T Communications of New England, Inc. ("AT&T") filed with the Department of Telecommunications and Energy ("Department") a motion for leave to file an amended and restated complaint in this proceeding, amending their complaint to allege that Verizon Massachusetts ("Verizon MA") charged them, and continues to charge them, at a rate exceeding the \$158 annual per amp rate in M.D.T.E. Tariff No. 15 for DC power in collocation arrangements obtained prior to the effective date of M.D.T.E. Tariff No. 17.¹ Verizon MA does not oppose this motion.

I. POSITION OF THE MOVANTS

Covad and AT&T state that they only recently discovered that Verizon MA was charging AT&T at collocation power rates established under M.D.T.E. Tariff No. 17, while charging Covad collocation power rates under M.D.T.E. Tariff No. 15 (Mot. at 1). Furthermore, Covad and AT&T state that they recently discovered that they had been charged at rates established for M.D.T.E. Tariff No. 17, prior to the effective date of that tariff, September 14, 2000 (id. at 1-2). Covad and AT&T state that the purpose of the amendment to their complaint is to clarify that they are requesting that the Department determine whether M.D.T.E. Tariff 15 may apply to the collocation arrangements in question, and which tariff applies (id. at 2).

Covad and AT&T claim that allowing the motion will not prejudice Verizon because settlement negotiations have been ongoing and the procedural schedule already has been postponed to accommodate these discussions (id.). Furthermore, the parties have not yet filed testimony (id.). Finally, Covad and AT&T assert that because Verizon MA has already collected the monies in dispute in this proceeding, any harm in further delay to this proceeding would be to Covad and AT&T, not to Verizon MA (id. at 3).

¹ Covad and AT&T also filed an Amendment to Complaint, attached to the motion.

II. STANDARD OF REVIEW ON MOTIONS TO AMEND COMPLAINT

Pursuant to 220 C.M.R. § 1.04(3), the Department allows or denies leave to file amendments to any pleading as a matter of discretion. Motions to amend are generally allowed unless some good reason appears for denying it. In making this determination, the Department may consider factors such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment. Cf. Castellucci v. U.S. Fidelity & Guaranty Co., 372 Mass. 288, 290 (1977) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)); Mass. R. Civ. P. 15(a). "If amendment is made to an initial pleading, an answer to said amended pleading, if permitted, shall be filed within such time as may be directed by the [hearing officer]." 220 C.M.R. § 1.04(3).

III. ANALYSIS AND FINDINGS

Although Covad and AT&T should have known under which tariff they allegedly were being charged at the outset of their complaint, the hearing officer finds that this was an oversight with no bad faith or dilatory motive on their part. The amended pleadings would state a claim that is related to the original pleadings. Furthermore, the hearing officer finds that allowing the motion will not cause undue delay because the parties have only requested a three week extension of the procedural schedule, which was granted on October 18, 2001. Finally, the hearing officer finds that Verizon MA will not be prejudiced, because Verizon MA has stated that it does not oppose the motion.

IV. RULING

Covad and AT&T's motion is GRANTED. The Amendment to Complaint which was attached to the motion shall be deemed as filed to amend the complaint. Verizon shall file an amended answer by October 29, 2001, as previously directed in the hearing officer ruling stamp-granting the Joint Request for Modification of Procedural Schedule (October 18, 2001).

Pursuant to 220 C.M.R. § 1.06 (6)(d)(3), any aggrieved party may file a written appeal of this ruling, with supporting documentation, to the Commission by October 31, 2001. A response to any appeal must be filed with the Department by November 2, 2001.

October 24, 2001
Date

/s/
Jesse S. Reyes, Hearing Officer